

APPENDIX

(Excerpts of the Decision of the Court of Criminal Appeals)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
May 6, 2003 Session

STATE OF TENNESSEE v. GREGORY ROBINSON

**Direct Appeal from the Criminal Court for Shelby County
No. 97-13179-80 James C. Beasley, Jr., Judge**

No. W2001-01299-CCA-R3-DD - Filed August 13, 2003

JOE G. RILEY, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

OPINION

[Deleted: STATE'S PROOF - GUILT PHASE]

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ANALYSIS OF ISSUES PRESENTED - GUILT PHASE

I. DENIAL OF INDIVIDUAL AND SEQUESTERED *VOIR DIRE* OF THE VENIRE

The defendant claims that the trial court erred in denying his motion for individual, sequestered *voir dire* of the jury panel. The prevailing *voir dire* practice is to examine jurors collectively. State v. Austin, 87 S.W.3d 447 app. at 471 (Tenn. 2002), *cert. denied*, ___ U.S. ___ (2003). There is no requirement in capital cases that death qualification of a capital jury be

conducted by individual, sequestered *voir dire*. *Id.* (citing State v. Stephenson, 878 S.W.2d 530, 540 (Tenn. 1994)). Moreover, as a general rule, the decision to allow individual *voir dire* of prospective jurors is within the discretion of the trial court. Stephenson, 878 S.W.2d at 540. The defendant has failed to show the trial court abused its discretion in denying his motion for individual, sequestered *voir dire*.

II. REJECTION OF BATSON CHALLENGE

The defendant contends that the trial court's conclusory rejection of a timely Batson challenge to the state's striking of five African-American members of the venire, without any contemporaneous findings and without requiring the state to proffer an explanation, warrants a remand for a hearing to determine whether a new trial should be granted.

During *voir dire*, seven jurors were excused by the state as a result of peremptory challenges. After their dismissal, the defense raised an objection and noted that five of these jurors were African-American. The trial court found there was no basis to declare that any of the challenges were based upon race.

A state's use of peremptory challenges to intentionally exclude jurors of the defendant's race violates the defendant's right to equal protection. Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The Court upheld this principle in Powers v. Ohio, but eliminated the requirement that the defendant and the potential juror share the same race. 499 U.S. 400, 415, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). A defendant seeking to raise a Batson claim must first make a *prima facie* showing of purposeful discrimination against a prospective juror. Batson, 476 U.S. at 93-94. The defendant must establish "that a consideration of all the relevant circumstances raises an inference of purposeful discrimination." Woodson v. Porter Brown Limestone Co., 916 S.W.2d 896, 903 (Tenn. 1996). If a *prima facie* showing of purposeful discrimination is established, the burden then shifts to the state to establish a neutral basis for the challenge. Batson, 476 U.S. at 97.

The trial court must give specific reasons for each of its factual findings in ruling on peremptory challenges. Woodson, 916 S.W.2d at 906. This should include the reason the objecting party has or has not established a *prima facie* showing of purposeful discrimination. The trial court's findings are to be accorded great weight and will not be set aside unless they are clearly erroneous. *Id.*; see also Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (noting deference to the trial court is necessary relating to credibility).

The trial court found that the defendant had not made a *prima facie* showing of discrimination. In determining whether the defendant has established a *prima facie* case, the trial court may consider whether similarly situated members of another race were seated on the jury. State v. Stout, 46 S.W.3d 689, 711 (Tenn.) (citations omitted), *cert. denied*, 534 U.S. 998 (2001). The trial court may also consider the demeanor of the attorney who exercised the challenge, which is often the best evidence of the credibility of proffered explanations. *Id.* at 711-12 (citations omitted).

In the instant case, the record reveals that the final jury consisted of six African-Americans and six Caucasians. At the motion for new trial, the court commented that the only reason advanced by the defense to establish a *prima facie* case was the number of strikes used against African-Americans. While the court conceded that a *prima facie* case may be established by numbers alone, the trial court further explained that was not done in the instant case. Indeed, the trial court stated:

. . . if all you're standing up and saying is . . . numbers alone, that's my *prima facie* case, I still – and I know what the case law says – but I'm still of the opinion that at the time of my observations, my being present, listening to the jurors testify, observing the demeanor of the jurors, watching and taking notes of what was going on, I was not convinced at that time that there was a systematic exclusion of African-Americans from this jury, and that was the basis for it; not strictly on numbers, but it was based on the overall circumstances of what was occurring in the courtroom.

We cannot conclude that the trial court's findings were clearly erroneous. See State v. Keen, 31 S.W.3d 196 app. at 227-29 (Tenn. 2000) (holding there was no showing of purposeful discrimination where four African-American jurors were peremptorily challenged by the state), *cert. denied*, 532 U.S. 907 (2001). In light of the trial court's findings, we conclude this issue is without merit.

III. SUFFICIENCY OF THE EVIDENCE

The defendant contends the evidence was insufficient to support his convictions. We conclude the evidence was sufficient to support both convictions.

A. Legal Standard

In Tennessee, great weight is given to the result reached by the jury in a criminal trial. A jury verdict accredits the state's witnesses and resolves all conflicts in favor of the state. State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *Id.*; State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Moreover, a guilty verdict removes the presumption of innocence which the appellant enjoyed at trial and raises a presumption of guilt on appeal. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). The appellant has the burden of overcoming this presumption of guilt. *Id.*

Where sufficiency of the evidence is challenged, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or crimes beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Abrams, 935 S.W.2d 399, 401 (Tenn. 1996). The weight and credibility of the witnesses' testimony are matters entrusted exclusively to the jury as the triers of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Brewer, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996).

The state's theory at trial was that the defendant was responsible for the actions of his fellow Gangster Disciples based upon the theory of criminal responsibility. It is undisputed that the defendant was not present at the murder scene. As applicable to the case at bar, a person is criminally responsible for the conduct of another if, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense." Tenn. Code Ann. § 39-11-402(2) (1997).

B. Analysis of Overall Sufficiency of the Evidence

In this case, it is without dispute that the victim was unlawfully removed or confined so as to substantially interfere with his liberty; it was accomplished with a deadly weapon; and the victim suffered serious bodily injury. Thus, an especially aggravated kidnapping was committed. *See id.* §§ 39-13-302(a), -305(a)(1), (4). It is further without dispute that the victim was intentionally killed with premeditation. Thus, a premeditated first degree murder was committed. *See id.* § 39-13-202(a)(1). The only issue relating to sufficiency of the evidence is whether the defendant was criminally responsible for the conduct of those who actually committed or consummated these offenses. *See id.* § 39-11-402(2).

We begin our detailed analysis of the evidence in this case by reiterating that our standard of examining the evidence in a light most favorable to the state includes "all reasonable and legitimate inferences that may be drawn therefrom." State v. Smith, 24 S.W.3d 274, 279 (Tenn. 2000) (citing Cabbage, 571 S.W.2d at 835). Thus, we recognize that jurors may evaluate the evidence in light of their common experiences in life and their common sense. *See* Liakas v. State, 286 S.W.2d 856, 858-59 (Tenn. 1956).

Viewing the evidence in a light most favorable to the state, the evidence established the defendant was a high ranking Gangster Disciple. He was portrayed as chief of security for the entire city of Memphis. Upon his arrival at Black's apartment, he ordered fellow Gangster Disciples to "snag" the victim for "GD arrest." Several Gangster Disciples, in parade-like fashion, brought the victim before the defendant. The defendant initiated a beating of the victim by hitting him numerous times; others subsequently joined in the beating. The defendant demanded that the victim tell him the location of the Vice Lords. Reluctantly, the victim revealed a location. The defendant then ordered some Gangster Disciples to scout the location and return with their findings, which they did. The evidence further indicated that the defendant was angry upon learning that the Vice Lords were not at the location described by the victim. The defendant, Prentiss Phillips, and Kevin Wilkins were each part of a telephone conversation with Kaos, who was superior in rank to the defendant. Immediately after this conversation, the defendant directed Phillips and Wilkins to each pick three men and take the victim "fishing." He further stated, "Y'all know what to do." Thus, it was reasonable for the jury to assume the defendant, Phillips, and Wilkins were all aware of Kaos's directive, and the defendant ordered that Phillips and Wilkins be responsible for carrying out that directive. Although Shipp thought the order to take the victim "fishing" only meant physical abuse, Shipp was not a part of the conversation with Kaos.

The jury could further infer that Wilkins, who had been a part of the phone conversation and knew the victim was to be killed, was ordered by the defendant to carry out the directive. One of the first things said to the victim at the park was from Wilkins, who was the ranking Gangster Disciple at the park and who asked the victim if he had any last words. The murder was then accomplished under Wilkins' direction.

As it relates to the charge of premeditated first degree murder, the state was required to establish beyond a reasonable doubt that the defendant in giving these orders had the specific intent that the victim be murdered. *See* Tenn. Code Ann. § 39-11-402(2). Viewing the evidence in a light most favorable to the state, we conclude a rational trier of fact could find the defendant and Wilkins got the directive from Kaos that the victim was to be killed; the defendant ordered Wilkins (and Phillips) to carry out the directive; and Wilkins, a subordinate of the defendant, personally supervised the murder. The jury could further rationally conclude from the evidence that the Gangster Disciples was an organization structured according to rank and that orders given by those of superior rank should be obeyed in order to avoid severe sanctions. Thus, the jury could rationally conclude Wilkins carried out the order of the defendant.

What started out as a rift between a Vice Lord and a Gangster Disciple culminated in the gathering of a throng of Gangster Disciples, heavily armed and bent on retaliation. The retaliation effort had as one of its leaders the defendant. The lower-ranking Gangster Disciples followed not only the defendant's orders, but his example of violence.

Accordingly, the evidence is sufficient to support the conviction for criminal responsibility for premeditated first degree murder.

As to the defendant's conviction for especially aggravated kidnapping, we conclude the evidence is sufficient. Viewing the evidence in a light most favorable to the state, the defendant ordered the victim to be brought to the apartment where numerous Gangster Disciples had weapons. The defendant severely beat the victim with his fist and a broom stick; others beat him as well. The defendant ordered that Green be taken upstairs where numerous gang members threatened him with weapons pointed at his head. The defendant ordered Green be taken "fishing" and told his fellow Gangster Disciples, "Y'all know what to do." Wilkins followed those orders, took the victim to Bellevue Park, and supervised the murder. This evidence is more than sufficient to support the defendant's conviction for especially aggravated kidnapping.

C. Accomplice Corroboration

The defendant argues that the evidence is insufficient because it consisted of uncorroborated accomplice testimony. Additionally, he asserts that the trial court failed to instruct the jury that (a) accomplice testimony cannot be corroborated by evidence from another accomplice; (b) only a non-accomplice can corroborate the testimony of an accomplice; (c) Jarvis Shipp was an accomplice as a matter of law; and (d) the jury must decide whether Christopher James and Shaun Washington were accomplices.

1. Waiver

The state contends that the defendant has waived these issues for failing to submit proposed instructions on accomplice testimony. *See State v. Anderson*, 985 S.W.2d 9, 17 (Tenn. Crim. App. 1997) (holding the failure to request accomplice instruction waives issue); *State v. Foster*, 755 S.W.2d 846, 848-49 (Tenn. Crim. App. 1988) (noting the defendant's responsibility to request instruction; failure constitutes waiver).

In instructing the jury regarding accomplice testimony, the trial court utilized the pattern jury instruction. *See* T.P.I.—CRIM. 42.09 (4th ed. 1995). The trial court further instructed the jury that they were to determine whether the witness, Jarvis Shipp, was an accomplice to the alleged crime. The pattern charge does not contain a specific provision that accomplice testimony cannot be corroborated by other accomplice testimony.

The record reflects the trial court advised the parties that it would be instructing on accomplice testimony. There were no special requests. After instructing the jury and prior to jury deliberations, there were no objections and no special requests. Tennessee Rule of Criminal Procedure 30(b) provides that the parties are to be given an opportunity to object to the content of jury instructions or the failure to give requested instructions; however, the failure to make objections in these instances does not prohibit them from being used as grounds in the motion for new trial. *See* Tenn. R. Crim. P. 30(b); *State v. Lynn*, 924 S.W.2d 892, 898-99 (Tenn. 1996). However, alleged omissions in the jury charge must be called to the trial judge's attention or be regarded as waived. *State v. Haynes*, 720 S.W.2d 76, 84-85 (Tenn. Crim. App. 1986). In contrast to an erroneous instruction or the failure to give a requested instruction, defense counsel cannot sit on an objection to an omitted charge and allege it as a ground in the motion for new trial. *Id.*; *State v. Tracey E. Stigall*, No. 02C01-9610-CR-00371, 1998 Tenn. Crim. App. LEXIS 27, at *4 (Tenn. Crim. App. Jan. 7, 1998, at Jackson).

The jury instruction given by the trial court was accurate. The defendant has waived any alleged error for the failure to specifically charge the jury that accomplice testimony cannot be corroborated by the testimony of other accomplices. Further, we discern no plain error. *See* Tenn. R. Crim. P. 52(b).

2. Standard of Review

An accomplice is a person who “knowingly, voluntarily and with a common intent unites with the principal offender in the commission of a crime.” *State v. Allen*, 976 S.W.2d 661, 666 (Tenn. Crim. App. 1997). Uncorroborated testimony of an accomplice-witness will not support a conviction. *State v. Bane*, 57 S.W.3d 411, 419 (Tenn. 2001), *cert. denied*, 534 U.S. 1115 (2002). Corroborating evidence is evidence “entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference not only that a crime has been committed but also that the defendant was implicated in it.” *Bigbee*, 885 S.W.2d at 803 (citations omitted). The independent corroborative testimony must include some fact or circumstance which affects the defendant's identity. *State v. Boxley*, 76 S.W.3d 381, 387 (Tenn. Crim. App. 2001). In *Bethany v. State*, this court stated:

The question of who determines whether a person is an accomplice depends upon the facts of each case. When the facts of a witness's participation in a crime are

clear and undisputed, it is a question of law for the court to decide. When such facts are in dispute or susceptible of an inference that a witness may or may not be an accomplice, it then becomes a question of fact for the jury to decide.

565 S.W.2d 900, 903 (Tenn. Crim. App. 1978); *see* State v. Lawson, 794 S.W.2d 363, 369 (Tenn. Crim. App. 1990).

3. Christopher James

The evidence established that Christopher James was a relatively new member of the Gangster Disciples and had no “rank” within the group. The evidence further established that, at the “aid and assist” meeting held at the apartment, James was punished for failing to take part in the earlier fight that initiated the chain of events culminating in the murder. Although he was present when Vernon Green was brought into the apartment, there is no evidence that James did anything other than sustain a beating for his failure to assist fellow gang members earlier that day. The proof fails to establish that James was an accomplice to the murder and kidnapping of Vernon Green.¹ Thus, the defendant’s argument that the trial court should have submitted an instruction to the jury as to whether Christopher James was an accomplice is without merit.

4. Shaun Washington

The defendant contends Shaun Washington’s identification should be considered accomplice testimony. Washington did not testify as a witness in this matter. Sergeant William Ashton testified that Christopher James identified the defendant in a photo line-up as the person whom James referred to as “Shaun.” Defense counsel asked Sergeant Ashton on cross-examination if anyone else identified the defendant in the photo line-up. Sergeant Ashton, in response to this question, stated that Washington had identified the defendant as being present at the apartment on the night of the murder. There was no request that Washington be included in the accomplice instruction. This issue is waived.

[Deleted: 5. Jarvis Shipp]

D. Identification Evidence

Within his challenge to the sufficiency of the evidence, the defendant challenges the following identifications: (1) the identification made by Christopher James using a photograph array; (2) the identification made by Shaun Washington; (3) the testimony of Jarvis Shipp; and (4) the testimony of Nichole Black. With the exception of the challenge to Shipp’s testimony,

¹We note that in the case of co-defendant Antonio Jackson, a panel of this court concluded that evidence of James’s presence at the apartment did not implicate him as an accomplice to the kidnapping or murder of Green. State v. Jackson, 52 S.W.3d 661, 666 (Tenn. Crim. App. 2001).

these issues are discussed in issue six, *infra*. Regarding Shipp, the defendant contends that his testimony is uncorroborated. However, we have concluded that the evidence sufficiently corroborated Shipp's testimony. Moreover, any conflicts between Shipp's testimony and his prior statement to police were thoroughly addressed on cross-examination.

E. Testimony of Christopher James

The defendant alleges the testimony of Christopher James as to what he thought was going to happen to the victim when he left the apartment was "pure, baseless speculation" and should be excluded from consideration in this appeal. During direct examination of James, the following colloquy occurred:

Q: What did you hear him say?

A: "Y'all know what to do."

...

Q: Now, was this after they had beaten you up?

A: Yes, ma'am.

Q: What did you think – what did you feel at this time was going on?

A: I really couldn't say.

Q: What did you think was going to happen to Vernon?

A: They was going to kill him.

No objection was made by the defendant. By failing to make a contemporaneous objection to testimony, a defendant waives appellate consideration of the issue. State v. Alder, 71 S.W.3d 299, 302 (Tenn. Crim. App. 2001); State v. Thompson, 36 S.W.3d 102, 108 (Tenn. Crim. App. 2000). Accordingly, absent an objection, the statement was properly admitted as proof. State v. Stevens, 78 S.W.3d 817 app. at 849 (Tenn. 2002), *cert. denied*, ___ U.S. ___ (2003). We further discern no plain error. *See* Tenn. R. Crim. P. 52(b).

[Deleted: F. Improperly Admitted Evidence]

G. Anthony Issue

The defendant contends his convictions for both premeditated first degree murder and especially aggravated kidnapping violate due process because the kidnapping was incidental to the murder. We disagree.

A separate conviction for kidnapping may violate due process when the kidnapping is "essentially incidental" to the accompanying felony conviction and is not "significant enough, in and of itself, to warrant independent prosecution." State v. Anthony, 817 S.W.2d 299, 306 (Tenn. 1991). In examining this issue, we must first determine whether the movement or confinement employed was beyond that which was necessary to commit the accompanying felony. State v. Dixon, 957 S.W.2d 532, 535 (Tenn. 1997). If so, we must next determine whether the additional movement or confinement: "(1) prevented the victim from summoning

help; (2) lessened the defendant's risk of detection; or (3) created a significant danger or increased the victim's risk of harm." *Id.*

We conclude the defendant's dual convictions for especially aggravated kidnapping and premeditated first degree murder do not violate due process. The movement and confinement of Green was beyond that necessary to commit the murder. Furthermore, the additional confinement and movement prevented Green from summoning help and lessened the risk of detection. Therefore, the especially aggravated kidnapping was not "essentially incidental" to the premeditated murder.

[Deleted: IV. PROSECUTORIAL INCONSISTENCY]

V. PROSECUTORIAL MISCONDUCT AND WITNESS JARVIS SHIPP

The defendant complains that prior to trial, Shipp attributed various acts to Prentiss Phillips, not to the defendant, and failed to identify the defendant as a co-perpetrator in these crimes. The defendant specifically alleges violations of Brady, 373 U.S. at 87, and Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). The defendant asserts that the prosecution withheld information of:

- (1) an informal "wink and a nod" . . . in exchange for Shipp's testimony, by which the state would not seek the death penalty against him if he went to trial; and
- (2) the transcript of a hearing held on Shipp's motion to suppress his own statement given to police (which had been denied), in which Shipp testified to a motive why he had confessed to the crime [which] was dramatically at odds with the claimed motives he (and the State's prosecutors) told the jury were his "courageous" reasons to do so (remorse for the victim and a desire to make amends to the victim's family).

The defendant claims he requested exculpatory information during pretrial discovery; the state failed to produce the information; and the information would have impeached Shipp's credibility.

The duty to disclose exculpatory evidence extends to all "favorable information" irrespective of whether the evidence is admissible at trial. Johnson v. State, 38 S.W.3d 52, 56 (Tenn. 2001). The prosecution's duty to disclose Brady material also applies to evidence affecting the credibility of a government witness, including evidence of any agreement or promise of leniency given to the witness in exchange for favorable testimony against an accused. Giglio, 405 U.S. at 154; Johnson, 38 S.W.3d at 56. While Brady does not require the state to investigate for the defendant, it does burden the prosecution with the responsibility of disclosing statements of witnesses favorable to the defense. State v. Reynolds, 671 S.W.2d 854, 856 (Tenn. Crim. App. 1984). However, this duty does not extend to information that the defense already possesses, or is able to obtain, or to information not in the possession or control of the

prosecution or another governmental agency. State v. Marshall, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992).

In order to prove a due process violation under Brady, the defendant must show the state suppressed “material” information. Brady, 373 U.S. at 87; State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995). Undisclosed information is material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Bagley, 473 U.S. at 682 (citations omitted); Johnson, 38 S.W.3d at 58. Furthermore, a reasonable probability is a “probability sufficient to undermine confidence in the outcome.” *Id.* To establish materiality, an accused is not required to demonstrate “by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal.” Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). Therefore, “[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Id.*

A. “Wink and a Nod” Agreement

During the defendant’s trial, Jarvis Shipp testified on direct examination that the state had not made him any promises in exchange for his testimony and that he was testifying freely and voluntarily. On cross-examination, the following colloquy occurred between defense counsel and Shipp:

Q: . . . Let me ask you this. Do you expect some type – although there’s not a formal deal, do you expect some type of consideration for your testimony here today?

A: Yes, because the simple fact I’m facing the death penalty.

Q: Okay. So you do expect to gain something in your case by testifying here today, correct?

A: If it’s in the progress[sic].

. . .

Q: Okay. So let me ask you this. You feel like by telling the story that you’ve told today that that could help you, correct?

A: Yes.

. . .

Q: And you feel that if you help them convict Mr. Robinson that they might not seek that death penalty against you, right?

A: No, because they still – I still could go to trial and they still get the death penalty.

Q: But you’re hoping that they consider that, correct?

A: Yes.

Q: And you’re hoping that that consideration will result in you [sic] not looking at a death-penalty situation, correct?

A: Correct.

The defendant asserts that, in two subsequent trials, *i.e.*, State v. Antonio Jackson and State v. Prentiss Phillips, Jarvis Shipp acknowledged he had an agreement with the state. During co-defendant Antonio Jackson's trial, Shipp initially denied that he had an agreement with the state. Later, however, he stated that his attorney had informed him that if he pled guilty, he would receive a sentence of life with the possibility of parole or less. Shipp further stated that, by testifying at Jackson's trial, he was hoping for a better deal from the state. Later in co-defendant Prentiss Phillips' trial, Shipp admitted that he intended to enter a guilty plea as to his involvement in the events. He further stated, "I expect my life to be saved."

At the defendant's hearing on his motion for new trial, Shipp's attorney, Gerald Skahan, was called to testify regarding any agreement between his client and the state. The following colloquy occurred:

- Q: Do you recall telling me when I asked what sort of agreement, if you had an agreement with the prosecutors, do you recall telling me basically it was a wink and a nod? . . .
- A: I did use . . . those words but in a context that – like I testified to earlier, . . . I was fortunate enough to have somebody that was able to give testimony. . . .
- What my personal opinion is about the way it's done, I think everybody knows what's happening. I think the defense lawyers know. I think the prosecutors know. And I think the defendants know from being in jail. But that's the way it's done here. . . . And as for Giglio and stuff like that, I think - - - that's where I use it in the context of a wink and a nod; . . . I think everybody knows what's going to happen, but there is never an offer conveyed. There is never something saying that we will specifically do this. It's just at the end of every one of these trials, it works out. And that's what I mean by a wink and a nod.

In its order denying the defendant's motion for new trial, the trial court found that at the time of the defendant's trial, Shipp did not have a "deal" with the state, although Shipp may have hoped his testimony would lead to a "deal." It further found the state did not withhold evidence of a "deal" from the defendant, and the defendant thoroughly questioned Shipp at trial regarding a possible "deal." The trial court concluded the state did not violate Brady or Giglio. We agree with the trial court.

While Shipp may have hoped that his testimony would result in favorable treatment, the record does not establish that an agreement existed between the state and Shipp at the time of the defendant's trial. See Hartman v. State, 896 S.W.2d 94, 101-02 (Tenn. 1995). Furthermore, the fact that Shipp later pled guilty to a lesser charge of facilitation of the offenses does not establish the existence of a prior agreement. See State v. Williams, 690 S.W.2d 517, 525 (Tenn. 1985). Moreover, Shipp testified in this case that he indeed expected to receive favorable treatment in exchange for his testimony. In the absence of any proof that an agreement indeed existed at the time of the Shipp's testimony at the defendant's trial, this issue is without merit.

B. Transcript of Motion to Suppress

Next, the defendant asserts that the state, in violation of Brady, failed to provide a copy of the transcript from Shipp's hearing on the motion to suppress his statement to police. In that transcript, Shipp averred that his original statement to police was given out of fear that he would be placed in a pod with members of the Traveling Vice Lords. The defendant claims that Shipp's motive of fear in giving the statement was at odds with his alleged noble motive of testifying at trial, which was "to tell the truth on my behalf and on behalf of the victim's family."

In its order denying the motion for new trial, the trial court found this information would not have affected the verdict. We likewise see little benefit that would have been derived from pointing out to the jury that Shipp's motive for giving the pretrial statement was fear, whereas his alleged motive for testifying at trial was more noble. In fact, it was the defendant's position at trial that the contents of Shipp's pretrial statement, which did not mention any involvement by the defendant, was accurate.

Regardless, we conclude this transcript does not meet the Bagley test for materiality. The trial court noted Shipp testified he hoped to gain some favor with the state through his testimony. The trial court found that defense counsel had questioned Shipp extensively regarding inconsistencies between his statement to police and his testimony at trial. Accordingly, we conclude there was no reasonable probability that, had this evidence been disclosed, the result of the proceeding would have been different. *See Bagley*, 473 U.S. at 682. The failure to reveal this transcript did not undermine the confidence in the outcome of the trial. *Id.*²

The defendant also contends that by failing to provide the transcript to Shipp's suppression hearing at the conclusion of Shipp's testimony, the state violated Tennessee Rule of Criminal Procedure 26.2 by failing to provide what is commonly referred to as Jencks material.³

Rule 26.2(a) provides that:

After a witness other than the defendant has testified on direct examination, the trial court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

²The state also contends this transcript was a public record equally available to the defense, thus exempting it from the Brady requirements. *See Marshall*, 845 S.W.2d at 233. Several courts have concluded the failure to reveal public records does not violate Brady. *See, e.g., Kidwell v. State*, 444 S.E.2d 789, 792 (Ga. 1994) (concluding transcripts of trials of other defendants were public records and, therefore, the state was not required to disclose them); *People v. Salgado*, 635 N.E.2d 1367, 1376 (Ill. App. 1994) (holding that prior inconsistent statements contained in transcripts were a matter of public record and no less available to the defendant than to the state). The defendant contends the suppression hearing transcript was not readily available to defense counsel. We need not determine this issue in light of our holding that the transcript did not meet the Bagley materiality test.

³The holding in *Jencks v. United States*, 353 U.S. 657, 672, 77 S. Ct. 1007, 1 L. Ed. 2d 1103 (1957), and subsequent congressional action was incorporated into Rule 26.2 of both the Federal and Tennessee Rules of Criminal Procedure, requiring the production of statements of witnesses at trial.

A “statement” of a witness includes “[a] written statement made by the witness that is signed or otherwise adopted or approved by the witness.” Tenn. R. Crim. P. 26.2(g).

Numerous federal courts have held that prior testimony does not qualify as Jencks material because the witness’s statements are a matter of public record. *See, e.g., United States v. Chanthadara*, 230 F.3d 1237, 1254-55 (10th Cir. 2000) (holding that the prior trial testimony of an expert witness was not Jencks material), *cert. denied*, 534 U.S. 992 (2001); *United States v. Jones*, 160 F.3d 473, 479 n.5 (8th Cir. 1998) (noting that matters of public record do not fall within the scope of the Jencks Act); *United States v. Isgro*, 974 F.2d 1091, 1095 (9th Cir. 1992) (stating that “trial testimony is not within the scope of the Jencks Act”), *cert. denied*, 507 U.S. 985 (1993); *United States v. Harris*, 542 F.2d 1283, 1293 (7th Cir. 1976) (same), *cert. denied*, 430 U.S. 934 (1977). The Tennessee rule is similar to the federal rule. *See* Fed. R. Crim. P. 26.2. Here the defendant contends he did not have ready access to this transcript. We need not determine this issue. For the same reasons we found the transcript did not meet the materiality test under Bagley, we conclude the defendant was not prejudiced by any alleged violation of Rule 26.2.

VI. IDENTIFICATION ISSUES

The defendant asserts that numerous errors regarding a photograph array and identifications warrant a new trial. We disagree.

A. Suggestive Photograph Array

The defendant first asserts that the trial court erred in allowing a suggestive photograph array into evidence over objection. We disagree.

1. Suppression Hearing

During the suppression hearing, the defendant presented the testimony of Charles Poole, who stated he was also arrested and charged with the murder of Green. Poole testified that after he was arrested, Sergeant Ashton questioned him and showed him a photograph array. Poole testified that when he did not identify anyone, Sergeant Ashton pointed toward the photograph of the defendant. Poole stated that although he did not identify anyone in the array, he believed the officer wanted him to identify the defendant’s photograph. Upon viewing the photograph array, Poole stated the array depicted five “dark-skinned” African-Americans and one “light skinned” African-American. He stated the defendant, who was depicted in photograph six, was the person with the light skin tone.

Sergeant William Ashton, the case coordinator, testified he prepared a photograph array and showed it to witnesses. He stated he arranged the array by using the defendant’s photograph and other photographs of those who resembled the defendant. The officer then presented the array to various witnesses and asked them if they could identify anyone in the array. Sergeant Ashton testified he never suggested to witnesses whom they were to identify.

Sergeant Ashton described the defendant's skin tone as "light" and opined that all of the men depicted in the photograph array had light skin tones. He stated he showed the array to Shaun Washington and Christopher James, both of whom identified the defendant's photograph.

2. Trial Court's Findings

In denying the defendant's motion to suppress the identifications and photograph array, the trial court found that Poole's credibility was "about as narrow as it can get." The trial court then stated it examined the photograph array and described the array as six photographs of African-American males with either a "shaved head or very, very short cropped hair" and "lighter" skin tones. It found that the photograph array was not overly suggestive and that photograph six, which depicted the defendant, was not unique as compared to the other five photographs in the array. The trial court then concluded the photograph array was not suggestive, that the officer's actions were not suggestive, and the witnesses did not rely upon anything suggestive in making their identifications.

3. Standard of Review

The findings of fact made by the trial court at the hearing on a motion to suppress are binding upon this court unless the evidence contained in the record preponderates against them. State v. Ross, 49 S.W.3d 833, 839 (Tenn. 2001). Absent a showing by the defendant that the evidence preponderates against the judgment of the trial court, this court must defer to the ruling of the trial court. State v. Cribbs, 967 S.W.2d 773, 795 (Tenn.), *cert. denied*, 525 U.S. 932 (1998).

4. Analysis

Convictions based on eyewitness identification at trial following a pre-trial photographic identification will be set aside only if the photographic identification was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968). However, a pre-trial confrontation procedure may be unlawful if, under the totality of the circumstances, the procedure is unnecessarily suggestive. Stovall v. Denno, 388 U.S. 293, 301-02, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967).

Although it may be suggestive, an identification may satisfy due process as reliable and admissible when considering the totality of the circumstances. *See* State v. Brown, 795 S.W.2d 689, 694 (Tenn. Crim. App. 1990). This court must consider five factors in determining whether the in-court identification is reliable enough to withstand a due process attack despite the suggestiveness of the pre-trial identification. Neil v. Biggers, 409 U.S. 188, 199, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); State v. Strickland, 885 S.W.2d 85, 88 (Tenn. Crim. App. 1993). These factors are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the time between the crime and the confrontation. Strickland, 885 S.W.2d at 88 (citing Biggers, 409 U.S. at 199).

Based upon our review of the photograph array, we conclude that the evidence does not preponderate against the findings of the trial court. Although the complexion of the defendant is somewhat lighter than the complexions of other persons in the array, it was not impermissibly suggestive. This issue is without merit.

[Deleted: B. Out-of-Court Identification by Shaun Washington]

[Deleted: C. Nichole Black's Testimony]

D. Failure to Grant a Continuance

The defendant challenges the trial court's refusal to grant an overnight continuance to permit him to obtain a "tattoo expert." At the motion for new trial hearing, this claim was expanded to include a witness regarding dental work. The defendant asserts that the denial prevented him from obtaining testimony which would have cast serious doubt upon the defendant's identity as the person who gave the orders on the night of the murder.

The defendant asserts he was surprised by the testimony of his witness, Officer Parker, who testified on cross-examination by the state that a tattoo could possibly be altered. The defendant sought permission to find a tattoo expert who could examine his tattoos. The trial court denied the request, noting the testimony was from a defense witness, the cross-examination should have been anticipated by the defendant, and the testimony, at most, indicated a mere possibility of an alteration. At the time the request was made, the defendant had not identified any particular expert nor had his tattoos been examined by someone to determine whether they exhibited signs of alteration.

At the motion for new trial hearing, defense counsel stated Jason Owens, a tattoo artist, "would have examined the defendant's tattoos, and he would have testified to the effect that [defense counsel had] represented and, also, as to his opinion as to whether there had been any cover-up or erasure of the defendant's tattoos." Defense counsel stated Owens would further testify that coverups or erasures are detectable. The defendant also presented a proffer from the records clerk of a dentist. The proffer indicated that the defendant had paid for gold crowns two months prior to the murder and gave no indication that the crowns contained letters or designs of the type attributed to "MacGreg." As the trial court noted, there had been testimony to the fact that gold caps are removable, and the proffer did not address that possibility.

The decision whether to grant a motion for a continuance is a matter of discretion for the trial court, the denial of which will not be overturned on appeal absent a clear showing the trial court abused its discretion to the prejudice of the defendant. State v. Melson, 638 S.W.2d 342, 359 (Tenn. 1982), *cert. denied*, 459 U.S. 1137 (1983); Baxter v. State, 503 S.W.2d 226, 230 (Tenn. Crim. App. 1973). In order to establish an abuse of discretion, the complaining party must make a clear

showing of prejudice as a result of the continuance being denied. State v. Teel, 793 S.W.2d 236, 245 (Tenn.), *cert. denied*, 498 U.S. 1007 (1990).

The offer to secure dental testimony was not a basis for the motion for a continuance. Since an appellant cannot change theories from the trial court to the appellate court, this aspect of the issue is waived. Alder, 71 S.W.3d at 303; State v. Dooley, 29 S.W.3d 542, 549 (Tenn. Crim. App. 2000). As to the request for a tattoo expert, we note, as did the trial court, that the controverted testimony was elicited from Officer Parker, who was a defense witness. The witness only stated that it was possible that the defendant's tattoos could have been altered. No particular witness was identified at the time of the request for a continuance, nor had the defendant's tattoos been examined by a potential witness. The trial court had no assurance that a witness could be secured by the next day of trial. We also note that the basis of identification by the state's witnesses did not relate to tattoos or gold teeth. The issue of tattoos and gold teeth arose during the testimony of defense witnesses. Under these circumstances, we are unable to conclude the trial court abused its discretion in denying the request for a continuance.⁴

**[Deleted: VII. USE OF THE VICTIM'S SKULL AND PHOTOGRAPHS DURING
THE GUILT PHASE]**

VIII. PROSECUTORIAL MISCONDUCT

The defendant alleges numerous instances of misconduct by the state. The state contends that in most instances the issue is waived due to the absence of a contemporaneous objection. The state further contends these allegations are otherwise without merit.

A. Witness Voucher

The defendant asserts that various prosecutorial comments made in relation to the testimony of Christopher James and Jarvis Shipp constituted improper vouching for their credibility and rendered his trial unfair. During the state's closing arguments, the prosecutor made comments regarding the honesty of both James and Shipp. The prosecutor also made comments during the direct-examination of Shipp and closing arguments regarding Shipp's bravery in testifying. The state responds, in part, that the defendant has waived this issue for failing to enter a contemporaneous objection. We agree with the state that the defendant has waived this issue due to his failure to proffer contemporaneous objections to the challenged remarks. *See State v. Green*, 947 S.W.2d 186, 188 (Tenn. Crim. App. 1997); State v. Farmer, 927 S.W.2d 582, 591 (Tenn. Crim. App. 1996); Tenn. R. App. P. 36(a). We further discern no plain error. *See* Tenn. R. Crim. P. 52(b).

⁴We see no indication in the record that the tattoo artist, Jason Owens, had examined the tattoos of the defendant. The defendant correctly states in his brief that an *ex parte* request for funds to retain Owens was filed shortly prior to the motion for new trial hearing and denied by the trial court.

B. The State Argued Facts not in Evidence

The defendant next complains of the following statement made by the prosecutor during closing argument: “[T]here was a murder, because there was an execution of a person, and the State has a duty to investigate that and do the best they can to determine who is responsible for that.” The defendant argues this statement transforms the prosecutor’s statements regarding the credibility of James and Shipp into “facts not in evidence.” The defendant further complains about the following argument made regarding Shipp: “[T]hat was a death sentence right then and there . . . [h]e’s got to watch his back everyday for the rest of his life.” In addition, he challenges the following statement made in reference to both witnesses: “[Chris James and Jarvis Shipp] haven’t conferred. . . . They haven’t talked. They haven’t met. . . . These men have not conferred in their testimony in any way.” Finally, the defendant states that the prosecutor improperly argued that, “[Sepacus Triplett], now that he is in the realm of confinement with other people who are involved in the Gangster Disciples organization, all of a sudden now he has a clear memory about his involvement.” The defendant contends no evidence exists in the record to support these statements.

Although we conclude all of these statements are reasonable inferences from the evidence, the defendant has waived any challenge to these issues by failing to raise a contemporaneous objection. *See* Tenn. R. App. P. 36(a). We further discern no plain error. *See* Tenn. R. Crim. P. 52(b).

C. The State Commented on the Defendant’s Decision not to Testify

During closing arguments in the guilt phase, the prosecutor stated

[Jarvis Shipp] said, I’m doing this, I’m telling you the truth to help me, but also doing this to help the victim’s family. Did you hear that from anybody else? – anybody else who sat in this chair and said, I pled to this, you know, I was there?

Did anyone else exhibit any remorse? Did anyone say, I want to do the right thing. I want to do – I want to assist this family in the grief that they’re exhibiting, that they’re feeling in this matter. No one else did.

The defendant now argues this was an improper remark on his election not to testify. *See Griffin v. California*, 380 U.S. 609, 613, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (holding prosecutor may not comment on the defendant’s failure to testify). Although these statements appear to properly relate to an attack on gang members who testified for the defense, the failure to contemporaneously object waives the issue. *See* Tenn. R. App. P. 36(a). Further, we discern no plain error. *See* Tenn. R. Crim. P. 52(b).

D. The State Presented Irrelevant Evidence Regarding the Victim

During its case-in-chief, the state presented the testimony of Christina Green, the victim’s sister. Ms. Green stated she and the victim had a “real close” relationship. She further stated she attended the victim’s funeral and that it was a “closed casket.” Defense counsel then objected, and the trial court sustained the objection, finding the information regarding the casket was not probative

to the state's case-in-chief. The prosecutor then asked Ms. Green if she missed her brother, and she responded affirmatively.

The defendant asserts that Christina Green's testimony was irrelevant to the issue of guilt or innocence and was not introduced for any other purpose but to inflame the passions of the jury. However, other than the testimony regarding the victim's coffin which the trial court sustained, the defendant did not contemporaneously object to this testimony. Therefore, any issue regarding Ms. Green's testimony in its entirety is waived. *See* Tenn. R. App. P. 36(a).

Next, the defendant alleges Dr. Deering's remark that the shotgun wound to the buttocks would have been painful was not relevant to a determination of guilt or innocence and only inflamed the jury. However, the defendant was charged with especially aggravated kidnapping, one element of which is serious bodily injury. *See* Tenn. Code Ann. § 39-13-305(a)(4). "Serious bodily injury" includes "extreme physical pain." *Id.* § 39-11-106(a)(34)(C). Accordingly, such testimony regarding the gunshot wound to the buttocks was relevant.

E. The State Made Improper Statements During *Voir Dire*

The defendant contends the state made improper statements to the jury during *voir dire*, which denied him a fair trial. During *voir dire*, the prosecutor, in discussing the different roles of the courtroom participants, stated:

On one matter that we all agree, we want a fair trial and impartial judicial proceeding. The defense wants that for their client, Mr. Robinson. But there's another person in this courtroom, ladies and gentlemen. Someone that you can't see. And that is the victim.

The defense objected and the trial court instructed the prosecutor to ask the jurors a question. The prosecutor then stated to the jury, "My question to you, . . . is that you keep that in mind throughout all your deliberations—there's one other person involved in this process." The defendant made no objection. The prosecutor then engaged in a lengthy discussion of the law and defined various legal terms.

The prosecutor's comments during *voir dire* had no effect on the result of the trial. These statements were minuscule compared to the lengthy *voir dire*. Furthermore, there is no indication that the prosecutor was acting with the intent to provoke unfair bias among the potential jurors. This issue lacks merit.

F. Victim's Identity

The defendant contends the state engaged in prosecutorial misconduct in seeking to suggest that he intended to obliterate the victim's identity despite the lack of supporting evidence and the trial court's instructions not to do so.

During the guilt phase of the trial, the state sought to introduce numerous photographs into evidence based upon its theory that the defendant intended that the victim's identity be obliterated.

The trial court refused to admit the photographs based upon this theory. However, Sergeant Alvin Peppers testified that upon arriving at the scene, he was unable to identify any of the victim's features because "the face of the body was so mutilated." Upon objection by defense counsel, the trial court disallowed the introduction of a photograph depicting the victim's face due to its prejudicial effect but permitted Sergeant Peppers to testify regarding his observations while at the scene.

Prior to Dr. Deering's testimony, the trial court held a jury-out hearing to discuss photographs which would be introduced during the doctor's testimony. The trial court again prohibited the state from introducing photographs based upon this theory because no one had testified that the defendant had instructed the gang members to erase the victim's identity. However, the trial court further stated that the prosecutor could argue an inference based upon the evidence admitted.

We are unable to conclude the state engaged in prosecutorial misconduct. The trial court refused to admit numerous photographs based upon this theory. Furthermore, the prosecutor could properly argue an inference based upon Sergeant Peppers' testimony regarding the appearance of the victim at the scene and Dr. Deering's testimony regarding the location and effect of the various gunshot wounds. This issue is without merit.

IX. JURY INSTRUCTIONS - GUILT PHASE

The defendant claims that the trial court improperly charged the jury. Specifically, he alleges the jury instructions defining "intentional" and "knowing" conduct, direct and circumstantial evidence, and reasonable doubt were erroneous. We disagree.

Under the United States and Tennessee Constitutions, a defendant has a right to trial by jury. State v. Garrison, 40 S.W.3d 426, 432 (Tenn. 2000). A defendant also has a right to a correct and complete charge of the law, so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions. *Id.* In evaluating claims of error in jury instructions, courts must remember that "'jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning.'" Vann, 976 S.W.2d at 101 (quoting Boyde v. California, 494 U.S. 370, 380-381, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990)), *cert. denied*, 526 U.S. 1071 (1999). Therefore, we review each jury charge to determine if it fairly defined the legal issues involved and did not mislead the jury. *See State v. Hall*, 958 S.W.2d 679, 696 (Tenn. 1997), *cert. denied*, 524 U.S. 941 (1998).

A. Instruction on Intentionally and Knowingly

In instructing the jury on the elements of premeditated first degree murder, the trial court defined "intentionally" as, "A person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result. . . ." In regard to second-degree murder, the trial court similarly defined "intentionally" and further instructed the jury as follows:

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect

to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.

The defendant cites as error the trial court's instruction on "intentionally" for premeditated first degree premeditated murder and "knowingly" for second degree murder because they are result-of-conduct offenses. In support of his argument, the defendant relies upon this court's decision in State v. Page, 81 S.W.3d 781 (Tenn. Crim. App. 2002), a decision filed long after the trial of this case. The defendant argues that this court's decision in Page requires reversal in the present case as the trial court committed the same error by instructing the jury in the disjunctive on the definition of "intentionally" and "knowingly." *Id.* at 788. [W]e conclude the instructions constituted harmless error. *See State v. Allen Lee Dotson, Sr.*, No. M2001-01970-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 884, at *12 (Tenn. Crim. App. Oct. 21, 2002, at Nashville), *perm. to app. denied* (Tenn. 2003).

B. Instruction on Direct and Circumstantial Evidence

The defendant challenges the trial court's use of the alternative pattern jury instruction on direct and circumstantial evidence. *See* T.P.I.—CRIM. 42.03(a) (4th ed. 1995). It provides in pertinent part as follows:

Direct evidence is those parts of the testimony admitted in court which referred to what happened and was testified to by witnesses who saw or heard [or otherwise sensed] what happened first hand. If witnesses testified about what they themselves saw or heard [or otherwise sensed], they presented direct evidence.

Circumstantial evidence is all the testimony and exhibits which give you clues about what happened in an indirect way. It consists of all the evidence which is not direct evidence. . . .

The defendant claims the instruction erroneously implies that "all evidence is direct evidence, except hearsay." Here, a "commonsense understanding of the instructions in the light of all that has taken place at the trial likely . . . prevail[ed] over technical hairsplitting." Boyde, 494 U.S. at 381. We conclude that there is no reasonable likelihood that the jurors interpreted the trial court's instructions so as to prevent proper consideration of direct and circumstantial evidence.

C. Reasonable Doubt Instruction

The defendant argues that the instruction provided by the trial court erroneously defined reasonable doubt. The trial court provided the following instruction on reasonable doubt:

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to

the certainty of guilt. Reasonable doubt does not mean a captious, possible or an imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense.

See T.P.I.—CRIM. 2.03 (4th ed. 1995).

Our courts have upheld the constitutionality of the language contained in this reasonable doubt instruction. See, e.g., State v. Bush, 942 S.W.2d 489 app. at 521 (Tenn.), *cert. denied*, 522 U.S. 953 (1997); Pettyjohn v. State, 885 S.W.2d 364, 365 (Tenn. Crim. App. 1994). Accordingly, this issue is without merit.

[Deleted: X. LESSER-INCLUDED OFFENSES]

XI. JURY MISCONDUCT

The defendant complains that his right to an impartial jury was violated when juror Gina Boyd was untruthful during *voir dire*, and, despite the sequestration order, Boyd had contact with a person outside the jury.

A. Bias/Prejudice

During *voir dire*, Boyd stated she worked “intake” as a deputy jailer in Shelby County. She denied knowing the defendant or anything about the case. Boyd stated she would be able to be fair and impartial in hearing all the evidence. During the motion for new trial, Boyd testified that although there were times when she was in different areas of the jail, she did not recall seeing the defendant in the jail.

Boyd stated that during the trial, she noticed an arm band on the defendant’s wrist and realized he was an inmate, although she still did not know where he was housed. She did not return to the jail until after the conclusion of the trial. Boyd maintained she never had supervisory authority over the defendant at the Shelby County Jail.

Defense counsel subsequently presented jail records which established that on October 8, 1998, Boyd was temporarily assigned to work in the pod where the defendant was housed for a period of three hours. Although the duty log sheet reflects that a head count may have been taken while Boyd was working in the pod, there is no indication as to who took the head count.

The burden is on the defendant to establish a *prima facie* case of juror bias. State v. Akins, 867 S.W.2d 350, 355 (Tenn. Crim. App. 1993). If a juror intentionally fails to disclose information on *voir dire* which might indicate partiality, a presumption of prejudice arises. *Id.*

The trial court found there was no “nexus” shown to exist between the defendant and the juror. The trial court further found there was no indication Boyd recognized the defendant. We conclude that the trial court’s ruling is supported by the evidence. This issue is without merit.

B. Separation of Sequestered Jury

At the hearing on the motion for new trial, juror Boyd testified that after being selected for the jury, she advised her mother she was selected for a “profile” murder case and was upset. Defense counsel stated they had interviewed the juror’s mother, who stated her daughter came home in order to secure clothing for her sequestration and said she was “extremely upset” in having to serve on “a high profile gangster case.”

The trial court found that juror Boyd had already testified she was upset and told her mother she was sitting on a “profile” murder case. Thus, the court saw no relevance in the mother’s proposed testimony. The defendant made no formal proffer of the mother’s testimony.

Although we question whether this issue has been properly preserved due to the failure to make a formal proffer of the mother’s proposed testimony, we find it without merit. Once separation of a sequestered jury has been shown by the defendant, the state has the burden of showing that such separation did not result in prejudice to the defendant. State v. Bondurant, 4 S.W.3d 662, 672 (Tenn. 1999). Here, the record supports the finding by the trial court that there was no showing of prejudice even if the mother testified in accordance with defense counsel’s declarations. This issue lacks merit.

XII. THIRTEENTH JUROR/ JUDGMENT OF ACQUITTAL

The defendant asserts that the trial court, acting in its capacity as the thirteenth juror, should have granted a new trial because the guilty verdicts were contrary to the weight of the evidence. Alternatively, he asserts that the trial court should have granted his motion for judgment of acquittal.

Tennessee Rule of Criminal Procedure 33(f) provides that “[t]he trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence.” When a trial court makes a determination following Rule 33(f), the court is acting as thirteenth juror. See State v. Gillon, 15 S.W.3d 492, 500 (Tenn. Crim. App. 1997). In the instant case, the trial court expressly approved the verdict as thirteenth juror in the order overruling the motion for new trial. Contrary to the defendant’s argument, the trial court is not required to delete from its consideration evidence that might later be found to be inadmissible.

The defendant also argues that the trial court erred by failing to grant his motion for judgment of acquittal. See Tenn. R. Crim. P. 29. This court has noted that “[i]n dealing with a motion for a judgment of acquittal . . . the trial judge is concerned only with the legal sufficiency of the evidence and not with the weight of the evidence.” State v. Hall, 656 S.W.2d 60, 61 (Tenn. Crim. App. 1983). The standard for reviewing the denial or grant of a motion for judgment of acquittal is analogous to the standard employed when reviewing the sufficiency of the convicting evidence after a conviction has been imposed. See State v. Ball, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998). Thus, our review of this issue is encompassed within our previous review of the sufficiency of the evidence.

[Deleted: XIII. CUMULATIVE ERROR]

XIV. SENTENCE FOR ESPECIALLY AGGRAVATED KIDNAPPING

The defendant does not challenge the length of his twenty-five-year sentence for especially aggravated kidnapping. However, he argues the trial court's order that it run consecutively to the sentence of death is flawed in that the trial court failed to make the requisite findings for consecutive sentencing. *See State v. Imfeld*, 70 S.W.3d 698, 708-09 (Tenn. 2002); *State v. Lane*, 3 S.W.3d 456, 460 (Tenn. 1999); *State v. Wilkerson*, 905 S.W.2d 933, 939 (Tenn. 1995).

A trial court may impose consecutive sentencing upon a determination that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exist. This section permits the trial court to impose consecutive sentences if the court finds, among other criteria, that "the defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." Tenn. Code Ann. § 40-35-115(b)(4). However, before ordering the defendant to serve consecutive sentences on the basis that he is a dangerous offender, the trial court must find that the resulting sentence is reasonably related to the severity of the crimes and necessary to protect the public against further criminal conduct. *See Imfeld*, 70 S.W.3d at 708-09; *Wilkerson*, 905 S.W.2d at 939.

Based on our review of the record, we conclude the trial court's findings parallel the requirements of the statute addressing consecutive sentencing and *Wilkerson*. *See* Tenn. Code Ann. § 40-35-115(b)(4); *Wilkerson*, 905 S.W.2d at 938-39. The trial court imposed consecutive sentencing based on its finding that the defendant was a dangerous offender. It further found the resulting sentence was reasonably related to the severity of the crimes due to the manner in which the victim was beaten and humiliated prior to his death. The trial court also specifically found society needed to be protected from the defendant. The trial court's findings are supported by the record based on the defendant's conduct.

[Deleted: ANALYSIS OF ISSUES PRESENTED - PENALTY PHASE]

XV. CHALLENGES TO THE (i)(5) AND (i)(7) AGGRAVATORS]

The defendant challenges the constitutionality of both the (i)(5) and (i)(7) aggravating factors. *See* Tenn. Code Ann. § 39-13-204(i)(5), (7). We disagree with the defendant's contentions.

A. (i)(5) Aggravator - Unconstitutionally Vague and Overbroad

The defendant argues that the "heinous, atrocious, or cruel" aggravator is vague and overbroad. However, our supreme court has rejected this argument. *State v. Keen*, 31 S.W.3d 196, 211 (Tenn. 2000), *cert. denied*, 532 U.S. 907 (2001).

He further asserts that the jury instruction, as given, is not a unitary instruction. Our supreme court has previously stated that the phrase "especially heinous, atrocious, or cruel" is a unitary concept, *State v. Van Tran*, 864 S.W.2d 465, 479 (Tenn. 1993), *cert. denied*, 511 U.S. 1046 (1994), which "may be proved under either of two prongs: torture or serious physical abuse," *Keen*, 31

S.W.3d at 209 (citations omitted). Further, our state supreme court has previously found the defendant's argument that the jury charge deprived him of a unanimous jury verdict to be without merit. State v. Sims, 45 S.W.3d 1, 18 (Tenn.), *cert. denied*, 534 U.S. 956 (2001).

B. (i)(5) Aggravator - Failing to Meaningfully Narrow Pool

The defendant argues that the (i)(5) aggravator, either alone or combined with the (i)(7) aggravator, fails to meaningfully narrow the class of death eligible defendants. The Tennessee Supreme Court has rejected this argument. See Terry v. State, 46 S.W.3d 147, 159 (Tenn.), *cert. denied*, 534 U.S. 1023 (2001).

[Deleted: C. (i)(5) and (i)(7) Aggravators - Vicarious Application]

XVI. DEFENDANT'S PRIOR ARREST

The defendant next asserts the trial court erred in failing to grant a mistrial when, during the sentencing phase, the state improperly asked a defense witness about the defendant's "prior arrest." The defendant presented his sister's testimony concerning his relationship with his family. On cross-examination, the state asked the defendant's sister whether she was aware of the defendant's prior arrest. The trial court sustained the defendant's objection and instructed the jury to disregard the question and answer.

Although we have difficulty understanding why a prosecutor would ask such a question in the penalty phase of a capital trial without prior court approval, we fail to find any resulting prejudice in light of the trial court's prompt curative instruction.

XVII. PREJUDICIAL INFORMATION REACHING THE JURY

A. List of Aggravating Circumstances

The defendant argues that the trial court improperly read to the jury all the possible aggravating circumstances during jury selection and not just the two relied upon by the state. The record reflects that the trial court did recite to the venire during the jury selection process the entire list of available statutory aggravating circumstances.

It is error for the trial court to instruct the jury on inapplicable aggravating circumstances. State v. Blanton, 975 S.W.2d 269, 281 (Tenn. 1998), *cert. denied*, 525 U.S. 1180 (1999). However, the entire list of aggravating circumstances was not submitted to the jury as part of the instructions prior to deliberations. It was simply part of the explanatory portion of the trial court's discussion with the venire. At the close of the proof at the sentencing phase, the jury was properly instructed only as to the two aggravating factors relied upon by the state. This issue is without merit.

B. Use of Especially Aggravated Kidnapping to Enhance Punishment

The defendant complains that the trial court permitted the prosecution to improperly suggest that the felony murder aggravator, which was based upon the underlying especially aggravated kidnapping, should be given extra weight against any mitigators. Specifically, the defendant cites to the state's argument, "You've already come to this determination that there was, indeed, an especially aggravated kidnapping and that there was, indeed, a murder. The other one is the heinous, atrocious, and cruel." This argument is misplaced. The prosecution was merely reiterating to the jury that they had found during the guilt phase the elements of especially aggravated kidnapping, the underlying felony in the (i)(7) aggravator.

The defendant also argues that the use of the same "serious bodily injury" to the victim to enhance kidnapping to especially aggravated kidnapping and to apply the (i)(7) aggravator was "double counting," which violated double jeopardy. Initially, we note that the felony murder aggravator is triggered by a murder in perpetration of a "kidnapping"; it is not required to be an "especially aggravated kidnapping." See Tenn. Code Ann. § 39-13-204(i)(7). Regardless, there is no double jeopardy violation. See *State v. Stout*, 46 S.W.3d 689, 706 (Tenn.), *cert. denied*, 534 U.S. 998 (2001).

C. Failure to Limit the State's Aggravators to (i)(5)

The defendant asserts that the trial court improperly permitted the state to rely upon two aggravating circumstances after defense counsel had detrimentally relied upon the state's opening argument of the penalty phase indicating it was relying upon only the (i)(5) aggravator. The state indeed only mentioned the "heinous, atrocious, or cruel" aggravator in its opening statement. However, prior to the defendant's proof, the trial court heard argument on this issue and ruled the state was not limited to only one aggravating factor. It further noted the state had given proper notice of both aggravators. We agree with this ruling and discern no undue prejudice to the defendant.

XVIII. PROHIBITION FROM CONSIDERING MITIGATING EVIDENCE

The defendant contends the trial court unconstitutionally prevented the sentencing jury from considering relevant mitigating evidence by excluding consideration of evidence of the defendant's character and record.

A. Instruction to Jury Regarding Mitigating Factors

The defendant complains of the following instruction regarding consideration of mitigating evidence:

Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing; that is, you shall consider any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence.

The defendant asserts that by failing to instruct the jury that it may also consider "any aspect of the defendant's character or record," this instruction erroneously limited the jury to mitigating evidence related to the circumstances of the offense, and, in effect, the jury was instructed not to consider any

evidence related to the defendant's character or record. The language suggested by the defendant is in the pattern jury instruction but was inadvertently omitted by the trial court. *See* T.P.I.—CRIM. 7.04(c) (4th ed. 1995); see also *id.* (7th ed. 2002).

A jury instruction on mitigating circumstances may be found “prejudicially erroneous” only if “it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law.” State v. Reid, 91 S.W.3d 247 app. at 308 (Tenn. 2002) (quoting State v. Hodges, 944 S.W.2d 346, 352 (Tenn.), *cert. denied*, 522 U.S. 999 (1997)). In the instant case, we conclude that the instructions provided by the trial court when viewed in their entirety fairly submitted to the jury the legal issues. Accordingly, the omission in the trial court's instruction did not prejudice the defendant.

B. Burden of Proving Mitigators

The defendant asserts the failure to instruct the jury that he did not have the burden of proof as to any mitigating factors was prejudicial. The jurors were instructed that the state had the burden of proving beyond a reasonable doubt any aggravating factor. They were further instructed there was no requirement for unanimity with respect to any particular mitigating factor. Upon reading the instructions as a whole, we fail to conclude the alleged omission misled the jury.

C. Closing Argument by the State

The defendant next objects to a portion of the state's closing argument during which the prosecutor asserted it was “patently offensive” to argue that the defendant's life should be spared because of his children and that such a plea was equally offensive in view of the defendant's lack of remorse. These statements were made during the state's rebuttal closing following the defendant's plea for mercy based upon his family support and potential for rehabilitation. The trial court cautioned the prosecutor after the defense objected to these statements. The trial court further instructed the jury:

Ladies and Gentlemen, let me say to you that the appearance, or lack of appearance, on behalf of Mr. Robinson of any remorse is not a factor for you to consider in determining what the punishment in the case should be. . . .

Lack of remorse is not a statutory aggravating circumstance, and it is not proper rebuttal because the defendant did not argue his remorse as a mitigating factor. However, the jury is presumed to follow the curative instruction of the trial court. State v. Butler, 880 S.W.2d 395, 399 (Tenn. Crim. App. 1994). Accordingly, although the prosecutor erred, such error is harmless in light of the curative instruction.

D. Trial Court's Limitation on the Defendant's Testimony

The defendant complains he was prevented from presenting evidence of his innocence at the penalty phase by virtue of an *in limine* order. Specifically, the defendant refers to the trial court's ruling regarding his statement given outside the presence of the jury at the beginning of the sentencing phase. During this jury-out hearing, the defendant asserted he was wrongfully convicted.

He also stated he did not receive a fair trial due to the admission of improper testimony, which the jury did not disregard. He further alluded to various instances of misconduct by a particular juror and improper removal of evidence from the courtroom by the prosecutor. In response to these statements, the trial court made the following ruling:

I'm not going to allow him to testify about the entire case in front of the jury, whether he, if he wants to testify he got a fair trial, or didn't get a fair trial and on all these other statements he wants to make. That may be proper, but I'm not going to allow him to get up there to attack a particular juror, so that's the basis for my decision.

The defendant subsequently testified but made no reference to the alleged unfairness of his trial. The defendant has cited no authority indicating a defendant has the right to testify that he did not receive a fair trial and verbally attack jurors. Nor do we find such attacks to be proper residual doubt testimony. "Residual doubt evidence" generally consists of proof at the sentencing phase indicating the defendant did not commit the offense, notwithstanding the guilty verdict. State v. McKinney, 74 S.W.3d 291, 307 (Tenn.), *cert. denied*, ___ U.S. ___ (2002); State v. Hartman, 42 S.W.3d 44, 55-56 (Tenn. 2001). Although the defendant had the right to proclaim his innocence, we are unable to conclude that he was prevented from doing so by virtue of the trial court's ruling.

E. Other Errors

The defendant asserts numerous errors during the penalty phase regarding closing arguments and the jury instructions which related to mitigating circumstances. We have reviewed the defendant's assertions and find the defendant is not entitled to relief on any of these issues.

XIX. ADMISSION OF PHOTOGRAPH DURING PENALTY PHASE

The defendant contends that the trial court erred in admitting a photograph depicting a detailed and close-up view of the gruesome wounds to the victim's face during the penalty phase. Although the trial court refused to admit the photograph at the guilt phase, the court permitted its introduction at the penalty phase, advising the jury to consider it only for the purpose of determining whether the crime was heinous, atrocious, cruel, or constituted torture.

Photographs depicting a victim's injuries have been held admissible to establish torture or serious physical abuse under aggravating circumstance (i)(5). *See, e.g., State v. Smith*, 893 S.W.2d 908, 924 (Tenn.1994) (photographs depicting the victim's body, including one of the slash wounds to the neck, which was "undeniably gruesome," were relevant to prove that the killing was "especially heinous, atrocious, or cruel" and were admissible for that purpose), *cert. denied*, 516 U.S. 829 (1995). The photograph in question accurately depicts the nature and severity of the injuries inflicted upon the victim. This evidence was relevant to the state's proof of the "heinous, atrocious, or cruel" aggravating circumstance. The decision to admit this photograph was not an abuse of discretion.

XX. PROSECUTOR'S ARGUMENTS

The defendant complains the state attempted to suggest the defendant intended to obliterate the victim's identity despite the fact there was no evidence to that effect, and the trial court repeatedly instructed the state not to do so. The defendant references the following argument of the state: "This was an extortion of his whole identity. His whole face, his identity. The aggravator we've proven is that there was a felony involved and that this was heinous, atrocious, and cruel." We discern no error regarding this statement.

XXI. JURY INSTRUCTIONS DURING SENTENCING

The defendant asserts the written verdict form misstated the law and allowed the jury to impose the death penalty without requiring the state to prove the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. At issue is that portion of the charge setting forth the requirements authorizing a sentence of death. The trial court quoted the pattern jury charge verbatim. *See* T.P.I.—CRIM. 7.04(c) (4th ed. 1995); *see also id.* (7th ed. 2002) (containing identical language). We are unable to conclude this charge misled the jury.

The defendant further contends the trial court erred by failing to define the "knowing" *mens rea* required for the felony murder aggravator. *See* Tenn. Code Ann. § 39-13-204(i)(7). If the court erred, the error was harmless.

[Deleted: XXII. EXISTENCE OF AGGRAVATING FACTORS]

[Deleted: XXIII. PROSECUTORIAL INCONSISTENCIES AND THE DEATH PENALTY]

[Deleted: XXIV. APPENDI V. NEW JERSEY]

XXV. THIRTEENTH JUROR - PENALTY PHASE

The defendant argues that the trial court, acting in its capacity as "thirteenth juror" pursuant to Tennessee Rule of Criminal Procedure 33(f), should have granted a new sentencing hearing since the jury's death verdict was contrary to the weight of the evidence. As previously indicated in this opinion, the trial court expressly approved the verdict as thirteenth juror in its order overruling the motion for new trial. The order specifically referred to the convictions as well as the penalty of death. This issue lacks merit.

XXVI. CONSTITUTIONALITY OF THE TENNESSEE DEATH PENALTY STATUTE

The defendant contends our death penalty statute is unconstitutional. The Tennessee death penalty statute has been upheld repeatedly. *See, e.g., State v. Reid*, 91 S.W.3d 247 app. at 312-14 (Tenn. 2002); *State v. Hines*, 919 S.W.2d 573, 582 (Tenn. 1995), *cert. denied*, 519 U.S. 847 (1996).

The defendant also argues death by lethal injection is unconstitutional. While the Tennessee Supreme Court has not expressly addressed this issue, *see* State v. Suttles, 30 S.W.3d 252, 264 (Tenn.), *cert. denied*, 531 U.S. 967 (2000), such challenges have been rejected by other courts. *See* Poland v. Stewart, 117 F.3d 1094, 1104-05 (9th Cir. 1997), *cert. denied*, 523 U.S. 1082 (1998); State v. Webb, 750 A.2d 448, 458 (Conn.), *cert. denied*, 531 U.S. 835 (2000); and State v. Hinchey, 890 P.2d 602, 610 (Ariz.), *cert. denied*, 516 U.S. 993 (1995). We likewise conclude that lethal injection is not constitutionally prohibited.

[Deleted: XXVII. COMPARATIVE PROPORTIONALITY REVIEW]

[Deleted: REMAND]

[Deleted: CONCLUSION]

JOE G. RILEY, JUDGE

Panel:
Judge David G. Hayes
Judge John Everett Williams